

it is adopted, would contain only the provisions which are set out in the text of the article and it is rather important to clearly state in the text of the article itself that the guarantees should be available at all stages.

The Commission has also explained in its *Commentary* that it had preferred to use the expression "fair treatment" because it was more comprehensive than the expressions which are normally found in the Constitution of States and their municipal laws such as "due process", "fair hearing" or "fair trial". The views expressed by the Commission on this matter appear to be correct because the expressions "fair hearing" or "fair trial" are often linked with the actual trial of the accused person and may not cover the period of his detention during investigation and pending trial. The expression "due process" is found in the Constitution of the United States of America and certain other municipal systems. The American courts have given a very broad meaning to the expression "due process" which would cover within its scope all the guarantees which should normally be available to a person accused of an offence or who is detained at all stages. The expression may, however, not be quite clearly understood in all countries without the assistance of judicial interpretation as available in the United States. It may consequently lead to some doubt if the expression "due process" were to be used in this article. We would, therefore, support the text of Article 8 as provisionally adopted by the Commission, subject to the addition of a clause which would clarify that the treatment guaranteed under this article is to be made available at all stages from the time of apprehension of the alleged offender until the final disposal of the case against him.

#### Article 9

(Text as adopted by the Commission)

The statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in Article 2 shall be, in each State party, that fixed for the most serious crimes under its internal law.

In order to appreciate the scope of this article it is necessary to clarify that under certain systems of penal law an

offender cannot be prosecuted or punished if a period of time as prescribed by law has elapsed between the commission of the crime and the prosecution of the offender, that is to say, an offender becomes immune from prosecution at the expiry of the specified time-limit prescribed by the relevant law. The period prescribed varies according to the gravity of the offence and the usual practice adopted by States is to provide for a longer period of limitation for graver offences. The concept of a time-limit for prosecution of an offender is, however, not recognised in the Common Law system which is applicable in Britain, United States, some of the former British territories in Asia and Africa and other countries in the Commonwealth. Under the Common Law system an offender may be prosecuted and punished whenever he is found irrespective of any time lag between the commission of the offence and the prosecution of the offender. In the countries which recognise in principle a period beyond which prosecution is not permissible, the time-limit is not uniform and varies from country to country.

We find the provisions of this article in its present form to be unacceptable in a situation where the alleged offender can be prosecuted and punished by all States irrespective of the place of the commission of the offence which concept forms the basis of the Commission's draft articles. In view of the fact that in some States there would be no period of limitation during which the offender may be prosecuted and also in view of the fact that the period of limitation for prosecution of the offender would vary from State to State, a situation may arise where the offender becomes immune from prosecution in the State whilst he remains liable to be prosecuted and punished in another. Conflicts between States may arise from such a situation where a State may demand extradition of the alleged offender but under the laws of the State where the alleged offender has been found, he is immune from prosecution. If the basis on which the Commission's draft articles have been adopted is to be accepted, namely, that all the States are competent to punish the offender, it would be necessary to prescribe in this article itself definite periods of limitation which would be universally applicable in all States, rather than leave the matter to be governed by the municipal law of each State.

If, on the other hand, the view prevails that the offender is to be prosecuted and punished only by the State where the offence has been committed or by the State where he is found, the provisions of this article may be regarded as acceptable.

The Commission in its *Commentary* has explained that the period of limitation prescribed in this article is the time within which prosecution is to be instituted and that it does not refer to any limitation as regards punishment. This is clear enough from the wording of the article itself.

#### Article 10

(Text as adopted by the Commission)

1. States party shall afford one another the greatest measure of assistance in connexion with proceedings brought in respect of the crimes set forth in Article 2, including the supply of all evidence at their disposal necessary for the prosecution.
2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

This article envisages co-operation between States party to the Convention in connection with criminal proceedings brought in respect of the crimes set forth in Article 2 by imposing an obligation to afford one another the greatest measure of judicial assistance. This article is of considerable importance and in keeping with the general objectives behind the provisions of the draft articles. It is clear that if the alleged offender is to be tried in a State in which the crime was committed, it is necessary to make testimony available to the court hearing the case. Apart from this it is possible that some of the evidence required may be available in third States.

Even if it is decided that the crime is to be punished only by the State where it is committed, the provisions of this article would still be appropriate as evidence may be in possession of the State where the offender is found or even in third States.

We accordingly recommend that the provisions of this article in its present form be accepted.

#### Article 11

(Text as adopted by the Commission)

The final outcome of the legal proceedings regarding the alleged offender shall be communicated by the State party where the proceedings are conducted to the Secretary-General of the United Nations who shall transmit the information to the other States party.

The provisions of this article become necessary mainly in the context that all States are entitled to prosecute and punish the alleged offender for the crimes enumerated in Article 2 of the draft articles. Once a person has been prosecuted and punished by a State, he should not be placed in jeopardy for a second time in respect of the commission of that very offence. In order to ensure that no State proceeds against that person a second time either by demanding his extradition or by dealing with him when he is found in its territory, the provision for the notification to all States is necessary. Apart from the provisions of Article 11, we feel that a specific provision should be made in the Convention that no person shall be punished twice for the same offence. This is a principle which is recognised in the Constitutions and municipal law of many States and we would suggest that a specific article be incorporated in the draft articles providing for protection of a person against double jeopardy. Such an article may be incorporated as Article 11-A. The protection against double jeopardy is so important and almost universally acceptable that a specific and separate article needs to be incorporated in the draft articles to deal with the matter.

#### Article 12

(Text prepared by the Commission)

##### Alternative A

1. Any dispute between the parties arising out of the application or interpretation of the present articles

that is not settled through negotiation may be brought by any State party to the dispute before a conciliation commission to be constituted in accordance with the provisions of this article by the giving of written notice to the other State or States party to the dispute and to the Secretary-General of the United Nations.

2. A conciliation commission will be composed of three members. One member shall be appointed by each party to the dispute. If there is more than one party on either side of the dispute they shall jointly appoint a member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Secretary-General shall appoint such member within a further period of two months. If no agreement is reached on the choice of the Chairman within five months of the written notice referred to in paragraph 1, the Secretary-General shall within the further period of one month appoint as the Chairman a qualified jurist who is not a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It shall be competent to ask any organ that is authorized by or in accordance with the Charter of the United Nations to request an advisory opinion from the International Court of Justice to make such a request regarding the interpretation or application of the present articles.

6. If the commission is unable to obtain an agreement among the parties on a settlement of the dispute within six

months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the depositary. The report shall include the commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six month time-limit may be extended by decision of the commission.

7. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States.

#### Alternative B

1. Any dispute between two or more parties concerning the interpretation or application of the present articles which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each party may at the time of signature or ratification of these articles or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other parties shall not be bound by the preceding paragraph with respect to any parties having made such reservation.

3. Any party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Government.

This article contains provisions regarding settlement of disputes which may arise out of the application or interpretation of the provisions of the draft Convention. The Commission has

made two alternative formulations which provide respectively for the reference of the dispute to conciliation (Alternative A) or to an optional form of arbitration (Alternative B).

It is now the general practice to include a provision for settlement of disputes in multilateral conventions and consequently such a provision ought to be included in any Convention which may be adopted for the purpose of protection and inviolability of diplomatic agents. The Commission has limited itself to suggesting a conciliation and an arbitration procedure as embodied in Alternatives A and B since in the light of current experience, they represent the largest measure of agreement that would appear to exist among governments on the question of settlement of disputes.

Alternative A is on similar lines as Article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto which found support from a substantial number of Asian-African Delegations. Alternative B practically reproduces the text of Article 14 of the Montreal Convention. The texts of both the alternatives, whichever is approved in principle, would need certain changes but we have refrained from making any suggestions at present in view of the fact that the governments should first decide on the principle underlying the two alternatives and the formulation of the texts would very much depend on the decision on this basic question.

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